No. 648 225

# In the Supreme Court of the United States

**October Term, A. D. 1921.**

WABASH RAILWAY COMPANY, *Petitioner,*

vs.

MILES ELLIOTT, *Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE H. KELLY,
WM. BUCHHOLZ,
I. B. KIMBRELL,
MARTIN J. O'DONNELL,
*Counsel for Respondent.*

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO.

# In the Supreme Court of the United States

**October Term, A. D. 1921.**

---

WABASH RAILWAY COMPANY, *Petitioner*,

vs.

MILES ELLIOTT, *Respondent*.

---

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

---

No. ——

---

## STATEMENT OF CASE.

*To the Honorable, The Supreme Court of the United States:*

The facts out of which the present controversy arose are well stated in the opinion of the Kansas City Court of Appeals, which petitioner has

omitted from its petition. Those facts as thus stated are as follows:

> "This is a suit under the Attorney's Lien Act. The facts show that on April 2, 1918, while the defendant Railway Company was in the charge of the Federal Government, and was being operated by the Director General of Railroads, Mern G. Welker, while employed as a brakeman upon the railroad, was killed at Shenandoah, Iowa. At the time of his death he was a resident of Shelby County, Missouri. Letters of administration on his estate were granted to his wife, Bessie G. Welker, by the Probate Court of Shelby County. On May 17, 1918, said Bessie G. Welker, as administratrix, entered into a contract with Miles Elliott of Chillicothe, Missouri, an attorney at law, who in the printed record is designated as movent, employing said Elliott as her attorney to represent her to 'investigate, settle, adjust, compromise, or bring suit upon her claim against the Wabash Railway Company on account of the death of her said husband,' and agreeing to pay him '50 per cent of all money received upon the above claim or cause of action, whether by suit, compromise or settlement.' After the execution of said contract Mr. Elliott drew up a written notice of his attorney's lien and placed it in the hands of the sheriff of Livingston County for service. It was addressed to the Wabash Railway Company, a corporation, reciting the substance of his contract with Mrs. Welker. This notice was dated May 23, 1918, and was served by the sheriff on the 24th day of May, 1918, his return reciting that he left a copy of the notice at the business office of the railway

company with W. R. Stepp, the agent and person in charge of said office, etc.

On June 5, 1918, Elliott filed suit in the Circuit Court of Livingston County to recover damages on account of the death of said Mern G. Welker, in which suit Bessie G. Welker, administratrix of the estate of Mern G. Welker, deceased, was plaintiff, and the Wabash Railway Company, a corporation, was defendant. At the January term, 1919, in the Circuit Court of Livingston County, a stipulation was filed in said cause for the dismissal of the same, signed by plaintiff and the Wabash Railway Company by C. G. Williamson, its counsel, and reciting that the subject matter of the cause had been fully settled, and stipulating that the suit should be dismissed at defendant's costs.

A few days after the filing of this stipulation, and before suit was dismissed, Elliott filed in the cause a motion entitled 'motion to enforce attorney's lien.' At the April term of said court, said Elliott, upon leave of court, filed an 'amended motion to enforce attorney's lien,' making Walker D. Hines, Director General of Railroads, as well as the Wabash Railway Company, defendant. The amended motion alleged that at all the times mentioned in said motion the 'Wabash Railway Company and its railway was to some extent and degree under the administration and control of the United States Railway Administration and of the United States Director General of Railroads,' under the 'Federal Control Act,' and proclamations of the President (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§3115¾a-3115¾p); that under General Order No. 50 the Director General of Railroads ordered

that he be made a party to all suits against railroads, and 'that the action herein is such a suit'; that Mern G. Welker was the employee of both defendants, and was killed by their negligence. Said motion further recited the granting of letters of administration to Bessie G. Welker, the contract between the latter and Elliott, the notice served upon the Wabash Railway Company, and that the agent upon whom such notice was served was agent of the Director General of Railroads, as well as of the Wabash Railway Company. It further alleged that defendants, with full knowledge of the terms and provisions of said contract, and without the knowledge or consent of Elliott, made a settlement with said administratrix, and in pursuance thereof paid her the sum of $4,000.00, together with $162.85 for funeral and burial expenses of the deceased; that 'your movent and petitioner has a lien upon the cause of action in the said cause in the amount of $4,162.85, and that to permit the dismissal of this cause under said alleged agreement for dismissal, and to enter judgment of dismissal thereunder, would wrongfully and illegally deforce movent and petitioner of his said lien'; and prayed judgment in said sum mentioned.

The separate answer of the railway company is: First, a plea in abatement and to the jurisdiction of the court over said defendant, alleging that at the time of the death of the deceased said railway company did not operate, control, or manage, and was not in possession of the property, railroad rights, and franchises of the Wabash Railway Company, and that such were in the possession of the Federal Government under the control, management and operation of

the Director General of Railroads; that defendant did not have or maintain an office or place of business in Chillicothe, Livingston County, Missouri, in charge of an agent upon whom process could be served; that the process served in the cause was not served upon an agent of said defendant. It further alleged that the court had no jurisdiction over the cause, for the reason that, under the orders of the Director General of Railroads, suits or causes of action of this character should be brought at the place where the cause of action accrued, or where the plaintiff resided; that under General Order No. 50 of the Director General of Railroads the suit should have been brought against the Director General of Railroads, and not against the Wabash Railway Company, and 'that process was issued against this defendant in violation of said order.' The answer also contains a plea to the merits, denying that any person authorized to represent it had made a settlement with the administratrix, and that it had paid any money in any such sum. It further denied that it had any notice or knowledge of any contract existing between plaintiff and Elliott, or that such notice was served on any agent or employee of the defendant.

The separate answer of the Director General of Railroads, Walker D. Hines, is first a plea in abatement and to the jurisdiction of the court, alleging that at all times mentioned in the petition of the administratrix and in the motion of Elliott, the property, rights and franchises of the Wabash Railway Company were in the sole possession and under the control of the Federal Government and not under the control, operation and management

of the Wabash Railway Company; that under General Order No. 50 of the Director General of Railroads said Director General was in sole possession, management and control of the property of the defendant Wabash Railway Company; that process was issued against the Wabash Railway Company as sole defendant in the original cause of said administratrix against said company; that the return of said process in said cause shows that the only defendant attempted to be served was the Wabash Railway Company; that no process whatever was ever issued against Hines, Director General of Railroads, or his predecessor in office; that suit was not brought where the cause of action arose nor at the residence of plaintiff, contrary to the orders promulgated by authority of law. Said answer by way of a plea to the merits denies that any process was ever issued or served against the Director General of Railroads, or that he had any knowledge of any contract existing between Elliott and the administratrix. The answer further contained a general denial. The reply was a general denial. There was a trial before the court, resulting in a judgment in favor of Elliott and against the Wabash Railway Company in the sum of $4,162.85 and costs, and in favor of the Director General of Railroads. Defendant Wabash Railway Company has appealed."

The opinion of the Court of Appeals applying the law to those facts is as follows:

"(1) Appellant contends that there is no authority under the Attorney's Lien Statute (Sections 690, 691, R. S. 1919) for a pro-

ceeding to enforce an attorney's lien by motion in the original cause where the settlement complained of is made before judgment, citing, among other cases, the case of *Mills* v. *Met.*, 282 Mo. 118, 221 S. W. 1. Respondent admits that, if this suit were based on Section 690 of the Attorney's Lien Statute, the contention would be well taken, but contends that he has a right to proceed by motion in the original cause where the proceeding is based on Section 691. We do not find it necessary to pass upon these contentions, for the reason that the situation in this case appears to be the same as that in the Mills case. While the record designates this proceeding as a motion to enforce attorney's lien, and the motion is filed in the cause of Bessie G. Welker, as administratrix of the estate of Mern G. Welker, deceased, against the Wabash Railway Company, and while such designation might indicate that it was a proceeding in the original case, an understanding of all the facts in the proceeding would indicate otherwise. The first pleading in the present proceeding alleges every fact necessary to a statement of an independent cause of action against the defendant Wabash Railway Company in an action at law for the deforcement of Elliott's lien, and prays judgment against said defendant for the amount thereof. Appellant makes no point that it was not served in this proceeding as in an ordinary action, nor did it object in the lower court to the form of the proceeding, but assumed that it was regular in this respect, and filed its plea in abatement and to the merits. To this answer Elliott filed a reply, consisting of a general denial. A trial was had upon the issues thus joined, and evidence was

received on behalf of all the parties; declarations of law and findings of fact were requested by such parties, and the case was submitted to the court, and judgment rendered, all in conformity with the rules and practices observed in civil actions in this state. The case was tried upon the theory that this proceeding was regular. The judgment rendered was a money judgment against the defendant, and nothing more. As before stated, the facts in reference to this matter were not essentially different from those that appeared in the Mills case, and under the holding in that case defendant's point is not well taken.

Whether Elliott could by his amended motion make the Director General of Railroads a party defendant jointly with the Wabash Railway Company is a question that is not before us for decision. There was no question raised in the trial court as to an improper joinder of parties defendant, and the Director General of Railroads has not appealed.

It is contended that the Circuit Court of Livingston County had no jurisdiction over the Wabash Railway Company in this case under the provisions of the Act of March 21, 1918 (Sections 3115¾a-3115¾p, U. S. Comp. St. 1918, Comp. St. Ann. Supp. 1919). In this connection it is insisted that, in view of the fact that the Wabash Railway Company was in charge of and under the control of the Federal Government, and being operated through the Director General of Railroads, the deceased was an employee of the Director General of Railroads, and was not in the employ of the defendant railway company; and in view of the fact that General Order No. 50 of the Director General of Railroads, providing that suits of this nature should be brought

against the Director General, and not otherwise, that the original suit herein was not only improperly brought against the Wabash Railway Company, but could not be maintained against the same, nor could Elliott's suit to recover his attorney's fees, and that it follows that the service of the notice of Elliott's contract on Stepp, station agent of the Wabash Railway Company, was not notice to the Wabash Railway Company, Stepp being an employee of the Director General, and not of the Wabash Railway Company, and that service of the original summons in the suit of the administratrix upon Stepp was void, and did not confer any jurisdiction upon the court over the defendant. Pertinent parts of General Order No. 50, promulgated October 28, 1918, read as follows:

'Whereas, since the Director General assumed control of said systems of transportation suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during Federal control for which the said carrier corporations are not responsible, and it is right and proper that the actions, suits and proceedings hereinafter referred to, based on causes of action arising during or out of Federal control should be brought directly against the said Director General of Railroads and not against said corporations:

'It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage of property, arising since December 31, 1917, and growing out of the possession, use, control or opera-

tion of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.'

(2) The summons in the original cause was executed by the sheriff, and in his return he recites that he executed the summons by leaving a copy of the writ and a copy of the petition thereto attached with W. R. Stepp, agent of the defendant, Wabash Railway Company, at the office of the defendant in Chillicothe, Livingston County, Mo.; said Stepp being the agent and person in charge of the business office of the defendant in Chillicothe, the president or other chief officer not being found in the county. Even though the return of the sheriff showing service of summons on the defendant was false, it is conclusive upon the parties to the suit and their privies, and can only be controverted in a direct attack upon it in an action against the sheriff for false return. *Smoot* v. *Judd*, 184 Mo. 508, 518, 83 S. W. 481; *Vicksburg, S. & P. Rd. Co.* v. *Anderson-Tully Co.* (C. C. A.), 261 Fed. 741, 744. There is nothing in the act of Congress or the orders of the Director General of Railroads to indicate that that the Wabash Railway Company, as a corporation, was not in existence, or that its entity as a corporation was suspended, even after its business and the operation of its railroad was taken over by the Federal Government (*Hines* v. *Dahn* [C. C. A.], 267

Fed. 105, 109, 110), and it is not impossible that said corporation might have had an agent in Chillicothe upon whom summons could have been served or might have maintained in its employ the usual officers and attorneys (*Hite* v. *St. Joseph & G. I. Ry. Co.*, 225 S. W. 916, 920; *Vicksburg, S. & P. Rd. Co.* v. *Anderson-Tully Co., supra*). Of course, we do not mean to say that the fact that the railway might have been sued would make it liable for the acts of the Director General of Railroads; that was a matter of defense and did not go to the jurisdiction of the court.

(3, 4) There was evidence tending to show that one Williamson, who was a claim agent and attorney employed by both the Director General and the Wabash Railway Company, made the settlement with the administratrix. The contract of settlement was in the form of a release, and recited that the money was paid by the Director General. However, the voucher for the money was signed by "Wabash R. R., Federal Account." The release stipulates that both the Director General and the railway company were released. Williamson, as attorney for the Wabash, filed a stipulation in the original cause of Bessie G. Welker, administratrix of the estate of Mern G. Welker, deceased, *versus* Wabash Railway Company, reciting that the subject-matter of the suit had been fully settled, and stipulating that the suit should be dismissed, at defendant's costs. This stipulation for dismissal was signed by the Wabash Railway Company, by Williamson, as counsel. The evidence shows that Williamson before he settled with the administratrix knew of Elliott's contract with her.

As the settlement was made after suit was brought, no notice of Elliott's lien was required. *Taylor* v. *Railroad*, 207 Mo. 495, 105 S. W. 740. Appellant is in no position to say that it did not make settlement with the administratrix in view of the fact that it accepted its benefits by filing the stipulation of dismissal. *Wilson* v. *St. Joseph & G. I. Ry. Co.*, 211 S. W. 897; *Reed* v. *John Gill & Sons Co.*, 201 Mo. App. 457, 459, 212 S. W. 43.

(5) In reference to the contention that, under Federal Order No. 50 of the Director General of Railroads, the original suit of the administratrix against the Wabash Railway Company was improperly brought against the railway company, instead of against the Director General, there is much conflict of authority as to whether said order is effective to require suits to be brought against the Director General, some cases holding that they must be brought in that manner on the ground that the railway company cannot be held liable for the acts or neglect of his servants or/and agents, but not on the ground that the Director General can deprive the courts of jurisdiction to determine whether the railway company in suits against it can be held for the acts or neglect of the servants and agents of the Director General. In other words, the question of whether the railway company or the Director General can be sued for the acts and conduct of the latter's servants and agents is not a jurisdictional question, but the courts still retain jurisdiction to try such a suit on the merits and to determine if the Federal Control Act, together with General Order No. 50, is or is not a matter in bar to the

merits of the action. In this connection it will be noted that the reason assigned in General Order No. 50 for its issuance was that—

"* * * Suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during federal control for which the said carrier corporations are not responsible."

The order in effect declares "carriers" not responsible for the conduct of the Director General and his agents. We will hereafter point out that the Director General has no right to issue orders limiting the jurisdiction of the courts. The courts still may lawfully issue and have served process to bring the railway company into court, even though the petition bases the cause of action on the negligence of the servants of the Director General. However, there are many cases holding that the federal statute, *supra*, provides for the suing of the carrier corporation itself. The cases pro and con are collated in the case of *Hines* v. *Dahn*, *supra*.

As before stated, there is nothing in the federal statute or order of the Director General of Railroads preventing or assuming to prevent the suing of the carrier as a corporation. The order does not prevent its suing or the being sued. The Supreme Court of this state in the case of *Hite* v. *St. Joseph & G. I. Ry. Co.*, *supra*, held that the federal statute *supra* provides for the operation of railroads by the companies themselves, but under federal control, and that an employee could maintain an action against the railroad company even though at the time of his injury the railroad was under federal con-

trol. This suit was brought before the pr
mulgation of General Order No. 50, and w
do not know what the Supreme Court of th
state would hold in a case brought aft
October 28, 1918.

(6) However, we find it unnecessary to g
into the question as to whether a recover
can be had against the railway corporati
for the acts of the Director General in vie
of the Federal Control Act and his order N
50, as the facts in this case show that th
administratrix had at least a bona fide di
pute or doubtful claim against the railwa
company as such. This is shown by th
fact that the courts themselves do not full
agree as to whether the suit may not h
successfully prosecuted against the railwa
company instead of the Director General o
Railroads. There is no contention that th
administratrix did not have a good cause o
action from the standpoint of negligent con
duct of one or the other, nor is there an
question but that the claim was asserted i
good faith. These facts, together with th
further fact that a suit was pending at th
time of the compromise, show that there wa
a sufficient consideration for the settlement
12 C. J. pp. 324, 326, 327; *Livingston* v
*Dugan*, 20 Mo. 102; *Wood* v. *Telephone Co*
223 Mo. 537, 565, 123 S. W. 6. There wa
not only sufficient consideration for the set
tlement, but the amount of money unde
the agreement to settle was actually paid
and received by the administratrix. In view
of all of these facts it is not incumbent up
on Elliott, in order to recover, to show tha
the claim was a valid one in the sense tha
claimant be able to recover on it. 12 C. J.
pp. 329, 330. This renders it unnecessary

for us to hold that the railway company is estopped to claim lack of consideration for the settlement by its conduct in accepting the fruits thereof after the amount of the settlement was paid the administratrix. From what we have said we think there is no question but that Elliott is entitled to recover, and that the court did not err in giving Elliott's declarations of law Nos. 3, 4 and 7 and in refusing defendant's declarations of law Nos. 4, 5, 6, 7, 9, and 13.

(7, 8) It is insisted that, if Elliott was entitled to recover, his recovery should be for only 50 per cent of the amount actually paid in settlement of the claim—that is, 50 per cent of $4,162.85—and for that reason the court erred in giving his declaration No. 2 and refusing defendant's declaration No. 3. There was evidence tending to show that Williamson said to the administratrix, in making the settlement, that the part he paid to her was hers; to put the money in the bank; to use the money as her own; and that she would not have to divide the money with her lawyers. While there was some evidence contradicting this, the finding of the trial court, sitting as a jury, on this conflict in the evidence is conclusive on us. *Mytton* v. *Mo. Pac. Ry. Co.*, 211 S. W. 111. In view of this evidence the amount of settlement was not the amount of money actually paid the administratrix, but the agreement was that the amount paid to the administratrix was only her part under the attorney's contract, and not the attorney's portion. As under the contract she had with Elliott her share was to be only 50 per cent of the whole sum, the total settlement was for twice the amount she received. There-

fore Elliott was entitled to recover one-half of the whole settlement, which is a sum equal to that paid his client. *Mytton* v. *N. Y. Central & St. L. R. Co.*, 198 S. W. 189; *Mytton* v. *Mo. Pac. Ry. Co., supra; Kaemmerer* v. *St. Louis Elec. Ry. Co.*, 201 Mo. App. 305, 211 S. W. 687; *Boyd* v. *Chase & Sons Mercantile Co.*, 135 Mo. App. 115, 115 S. W. 1052; *Curtis* v. *Met.*, 125 Mo. App. 369, 102 S. W. 62; *Curtis* v. *Met.*, 118 Mo. App. 341, 94 S. W. 762.

(9) It is insisted that by reason of General order Nos. 18 and 18a promulgated by the Director General of Railroads, providing that suits against carriers must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose, the Circuit Court of Livingston County had no jurisdiction, as the plaintiff resided in Shelby County and the cause of action arose in Iowa. The venue in transitory causes of action provided by the laws of the state could not be modified or limited by orders of the Director General, as was attempted in General Orders 18 and 18a. *State* v. *Calhoun*, 281 Mo. 583, 220 S. W. 6; *Haubert* v. *Baltimore & Ohio R. Co.* (D. C.), 259 Fed. 361, 363; *Moore* v. *Atchison, T. & S. F. Ry. Co.*, 106 Misc. Rep. 58, 174 N. Y. Supp. 60; *Illinois Central R. Co.* v. *Ryan* (Tex. Civ. App.), 214 S. W. 642; *El Paso & S. W. R. Co.* v. *Lovick* (Tex. Civ. App.), 210 S. W. 283; *Pullman Co.* v. *Uribe* (Tex. Civ. App.), 225 S. W. 189; *Young* v. *Hines*, 229 S. W. 417, decided by this court, but not yet (officially) reported.

The judgment is affirmed.

All concur.

The opinion of the Court of Appeals on motion for rehearing is as follows:

"Since the foregoing opinion was handed down, the case of *Adams* v. *Q., O. & K. C. R. Co.*, has been published in 229 S. W. 790, and in its motion for a rehearing defendant contends that our decision is in conflict with that one of the Supreme Court. That decision holds that the railroad company is not liable for the acts of those employed in the railroad service during federal control. On the original submission of this case we said:

'This suit (*Hite* v. *Ry.*, 225 S. W. 916) was brought before the promulgation of General Order No. 50, and we do not know what the Supreme Court of this state would hold in a case brought after October 28, 1918.'

The Supreme Court has answered this in the Adams case. However, we were careful in the opinion to say, 'We find it unnecessary to go into the question as to whether a recovery can be had against the railway corporation for the acts of the Director General.' and placed our decision on the proposition that it was not necessary that there could be such a recovery, but, as Mrs. Welker had a *bona fide* doubtful claim against the railway corporation, and that corporation settled it with her while the suit was pending against it, there was a sufficient consideration for the settlement and the settlement was paid, and that, consequently, it was unnecessary for Elliott to show his client's claim was a valid one in the sense that the claimant be able to recover on it.

The fact that the claim was at least a doubtful one when the settlement was made is shown by the cases of *Hite* v. *Ry.*, *supra*; *Postal Telegraph Co.* v. *Call*, 255 Fed. 850,

167 C. C. A. 178; *Jenson* v. *L. V. R. Co.* (D C.) 255 Fed. 795; *Johnson* v. *McAdoo* (D. C.) 257 Fed. 757; *Witherspoon* v. *Postal, etc. Co.* (D. C.), 257 Fed. 758; *The Catawissa* (D. C.), 257 Fed 863; *Dampskibs* v. *Hustis* (D. C.) 257 Fed. 862; *Lavalle* v. *N. P. R. Co.*, 143 Minn. 74, 172 N. W. 918, 4 A. L. R. 1659; *Gowan* v. *McAdoo*, 143 Minn. 227, 173 N. W. 440; *Paylo* v. *N. P. R. Co.*, 144 Minn. 398, 175 N. W. 687; *Ringquist* v. *M. & N. R. Co.*, 145 Minn. 147, 176 N. W. 344; *McGregor* v. *G. N. R. Co.*, 42 N. D. 269, 172 N. W. 841, 4 A. L. R. 1635; *Franke* v. *C. & N. W. R. Co.*, 170 Wis. 71, 173 N. W. 701; *M. P. R. Co.* v. *Ault*, 140 Ark. 572, 216 S. W. 3; *Lancaster* v. *Keebler* (Tex. Civ. App.) 217 S. W. 1117; *Clapp* v. *Amer. Ex. Co.*, 234 Mass. 174, 125 N. E. 162; *Owens* v. *Hines*, 178 N. C. 325, 100 S. E. 617.

With the concurrence of ARNOLD, J., the motion for a rehearing is overruled; and it is so ordered."

It appears, therefore, that the statement of the case set forth in the petition for the writ is not exactly in accordance with the facts as set forth in the opinion of the Court of Appeals.

Two reasons are advanced by the petitioner in support of the proposition that the judgment should be brought here for review: First, that the judgment and decision of the Kansas City Court of Appeals is directly in conflict with the decision of this court made on June 1, 1921, in the case of *Missouri Pacific* v. *Ault*, where, among other things, it was held that the railroad corporations were not liable for the acts or omissions

of the Director General in operating the railroads under the Federal Control Act.

The original opinion of the Court of Appeals, as well as the opinion on the motion for rehearing, demonstrates that the liability of the defendant corporation was not based upon any act or omission of the Director General, but was based upon its own act in entering its appearance and in filing a stipulation to dismiss a suit filed against it in good faith and upon a cause of action which the Supreme Court of Missouri and the courts of many other states, as well as the Federal courts, had held was valid, which stipulation recited that defendant corporation had settled same and was taking advantage of settlement made for its benefit, and dismissing the suit.

This is shown by the opinion wherein it is said:

> "We find it unnecessary to go into the question as to whether a recovery can be had against the railway corporation for the acts of the Director General in view of the Federal Control Act and his order No. 50, as the facts in this case show that the administratrix had at least a *bona fide* dispute or doubtful claim against the railway company as such. This is shown by the fact that the courts themselves do not fully agree as to whether the suit may not be successfully prosecuted against the railway company instead of the Director General of railroads. There is no contention that the administratrix did not have a good cause of action from the standpoint of negligent conduct of one or the other, nor is there any question but that the claim was asserted in good faith. These facts, to-

gether with the further fact that a suit was pending at the time of the compromise, show that there was a sufficient consideration for the settlement. 12 C. J. pp. 324, 326, 327; *Livingston* v. *Dugan*, 20 Mo. 102; *Wood* v. *Telephone Co.*, 223 Mo. 537, 565, 123 S. W. 6. There was not only sufficient consideration for the settlement, but the amount of money under the agreement to settle was actually paid and received by the administratrix. In view of all of these facts it is not incumbent upon Elliott, in order to recover, to show that the claim was a valid one in the sense that claimant be able to recover on it. 12 C. J., pp. 329, 330. This renders it unnecessary for us to hold that the railway company is estopped to claim lack of consideration for the settlement by its conduct in accepting the fruits thereof after the amount of the settlement was paid the administratrix. From what we have said we think there is no question but that Elliott is entitled to recover."

On rehearing the Court of Appeals had before it the identical question presented to this court in the petition, and had before it all the authorities, together with the decision of the Supreme Court of Missouri in *Adams* v. *Railway Co.*, 229 S. W. 790, where the Supreme Court of that state holds that the railway company is not liable for the acts of those employed in the railroad service during federal control. The Court of Appeals in the opinion herein recognizes that this is the law, and expressly says on motion for rehearing:

"We were careful in the opinion to say, 'We find it unnecessary to go into the ques-

tion as to whether a recovery can be had against the railway corporation for the acts of the Director General,' and placed our decision on the proposition that it was not necessary that there could be such a recovery, but, as Mrs. Welker had a bona fide doubtful claim against the railway corporation, and that corporation settled it with her while the suit was pending against it, there was a sufficient consideration for the settlement and the settlement was paid, and that, consequently, it was unnecessary for Elliott to show his client's claim was a valid one in the sense that the claimant be able to recover on it.

The fact that the claim was at least a doubtful one when the settlement was made is shown by the cases of *Hite* v. *Ry., supra; Postal Telegraph Co.* v. *Call*, 255 Fed. 850, 167 C. C. A. 178; *Jensen* v. *L. V. R. Co.* (D. C.), 255 Fed. 795; *Johnson* v. *McAdoo* (D. C.), 257 Fed. 757; *Witherspoon* v. *Postal, etc., Co.* (D. C.), 257 Fed. 758; *The Catawissa* (D. C.), 257 Fed. 863; *Dampskibs* v. *Hustis* (D. C.), 257 Fed. 862; *Lavalle* v. *N. P. R. Co.*, 143 Minn. 74, 172 N. W. 918, 4 A. L. R. 1659; *Gowan* v. *McAdoo*, 143 Minn. 227, 173 N. W. 440; *Paylo* v. *N. P. R. Co.*, 144 Minn. 398, 175 N. W. 687; *Ringquist* v. *M. & N. R. Co.*, 145 Minn. 147, 176 N. W. 344; *McGregor* v. *G. N. R. Co.*, 42 N. D. 269, 172 N. W. 841, 4 A. L. R. 1635; *Franke* v. *C. & N. W. R. Co.*, 170 Wis. 71, 173 N. W. 701; *M. P. R. Co.* v. *Ault*, 140 Ark. 572, 216 S. W. 3; *Lancaster* v. *Keebler* (Tex. Civ. App.), 217 S. W. 1117; *Clapp* v. *Amer. Ex. Co.*, 234 Mass. 174, 125 N. E. 162; *Owens* v. *Hines*, 78 N. C. 325, 100 S. E. 617."

Afterwards the petitioner herein presented a petition for writ of certiorari to the Supreme Court of Missouri and that court denied the petition for the writ, holding there was no conflict in the decision of the Court of Appeals and the decision of the Supreme Court in the Adams case, which is exactly the holding of this court in the Ault case. This court will observe that the Transportation Act of 1920, mentioned in the Adams case by the Supreme Court of Missouri, authorized the substitution of the agent of the President for the carriers, and that the petitioner did not avail itself of the right, if any, it had to substitute said agent.

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Three well defined reasons stand in the way of granting the writ of certiorari:

I. Absence of a federal question.

II. The decision of the Kansas City Court of Appeals rests on an independent principle of non-federal law.

III. Clear and palpable error on the part of the state court does not appear.

### I.

It is essential to the jurisdiction of this court that it shall appear that a federal question is involved; that it was raised in and presented to the state court and that the decision was against the right claimed; that the question of federal law is of such controlling character that its correct decision is necessary to any final judgment in the case; or that there has been no decision by the state court of any other matter or issue sufficient to maintain the judgment of that court without regard to the federal question.

*Murdock* v. *Memphis*, 20 Wall. 590-642.

The existence of jurisdiction to review under these principles depends not merely upon form, but upon substance.

*Seaboard Air Line* v. *Padgett*, 236 U. S. 671.

To express it more clearly we quote from *Western Union Teleg. Co.* v. *Wilson*, 213 U. S. 52, on page 53:

> "This case comes here from a state court, and, of course, therefore it must appear that a federal question necessarily was involved in the decision before this court can take jurisdiction or undertake to reverse the judgment of a tribunal over which it has no general power. It is not enough that a right under the Constitution of the United States was specially set up and claimed. It must be made manifest either that the right was denied in fact, or that the judgment could not have been rendered without denying it. *De-Saussure* v. *Gaillard*, 127 U. S. 216; *Johnson* v. *Risk*, 137 U. S. 300; *Leathe* v. *Thomas*, 207 U. S. 93, 99; see also *Batchel* v. *Wilson*, 204 U. S. 36."

II.

**The decision of the Kansas City Court of Appeals is based upon an independent principle of general law which eliminates liability upon the part of the defendant for the acts of the Director General of Railroads, thus excluding a federal question. Therefore, the consideration of a federal question was not necessary to the court's decision.**

Petitioner does not gainsay this proposition, but claims that the Kansas City Court of Appeals missed the point at issue. We think that it hit the point at issue, but it makes no difference whether it did or not. Its decision in the case

was a decision on a non-federal question and this court will not review it. That is to say, its decision was upon the question: When a suit is pending, and is asserted in good faith, in a court of general jurisdiction, against a defendant who appears in that court, and that defendant makes a settlement of the claim and files a stipulation to dismiss the suit, does the settlement of the claim and the stipulation to dismiss, make it liable under the general principles of law? Certainly, this is not a federal question. As was said in the case of *Murdock* v. *Memphis*, 20 Wall. 642, l. c. 638:

> "The claim of right here set up is one to be determined by the general principles of equity jurisprudence, and is unaffected by anything found in the Constitution, laws, or treaties of the United States. *Whether decided well or otherwise by the State Court, we have no authority to inquire.*"

The Kansas City Court of Appeals had the right to apply the general principles of law enunciated by the Supreme Court of the state in *Livingston* v. *Dugan*, 20 Mo. 102; *Wood* v. *Telephone Co.*, 223 Mo. 537; 12 C. J., 324, 326, 327.

This court, in the following cases, has expressly recognized the application of the principle that the settlement of a *bona fide* dispute or doubtful claim is binding upon the parties and the courts, and that when a trial court refuses to give effect to such settlement, as did the Kansas City Court of Appeals give effect herein, it fails to

give effect to a controlling principle of general law.

*San Juan* v. *St. John's Gas Co.*, 195 U. S. 510.
*Fire Ins. Assn., Ltd.*, v. *Wickham*, 141 U. S. 564.
*Hennessy* v. *Bacon*, 137 U. S. 78.
*Bofinger* v. *Tuyes*, 120 U. S. 198
*Northern Liberty Market Co.* v. *Kelly*, 113 U. S. 199.
*Jeffries* v. *New York Mut. L. Ins. Co.*, 110 U. S. 305.
*St. Louis* v. *U. S.*, 92 U. S. 462.
*U. S.* v. *Child*, 12 Wall. 232.
*Union Bank* v. *Geary*, 5 Pet. 99.

Though on a general principle of non-federal law, we would add that the dissenting opinion of Judge Trimble, of the Kansas City Court of Appeals, which petitioner quotes at length, utterly ignores the fact that upon the disputed issue as to who made the settlement, the trial court, sitting as a jury, found that the settlement was in fact made by defendant Wabash Railway Company. There is no principle more firmly established by the courts of Missouri than that the finding of the trial court on disputed questions of fact is binding on, and cannot be disturbed by, the appellate courts. Cases without number so holding could be cited, but we will content ourselves with the citation of only a few of the recent authorities:

*Quisenberry* v. *Stewart*, 219 S. W. 625.
*Webster* v. *Webster's Estate*, 189 S. W. 608;

*Shelton v. Railway*, 190 S. W. 46.
*Russell Grain Co. v. Bainter*, 223 S. W. 769.

To show that the trial court had before it substantial evidence on which to base its finding, approved by the Missouri appellate courts, that defendant Wabash Railway Company made the settlement, we have only to quote the stipulation signed and filed by such defendant (see Petitioner's Abstract of Record, p. 53):

> "In the Circuit Court of Livingston County, Missouri. To the ..... Term, 1918.
> Bessie G. Welker, Administratrix,
> Estate of Mern G. Welker, deceased,
> vs.
> Wabash Railway Company.
> The subject matter of the above entitled *suit* having been fully *settled between the parties hereto*, it is hereby stipulated and agreed that said suit be dismissed at defendant's cost.
> (Signed) BESSIE G. WELKER,
> Administratrix, etc., Plaintiff.
> WABASH RAILWAY COMPANY,
> Defendant.
> By C. G. WILLIAMSON, Its C—."

Bearing in mind that at the time this stipulation was signed and filed by the Wabash Railway Company, it and the plaintiff administratrix were the only parties to the suit, the recitation of the "*suit having been fully settled between* the parties hereto," is and can be nothing but the written, signed statement of the Wabash Railway Com-

pany that it had made the settlement. Men have been convicted of grave crimes on statements far less solemn.

It is immaterial that the decision of this court in *Mo. Pac. R. R. Co.* v. *Ault*, or the decision of the Supreme Court of Missouri in the Adams case rendered long after the settlement was made, shows the rights of the parties to have been different from what they at the time supposed. *Hennessey* v. *Bacon*, 137 U. S. 78; *Mills County* v. *Burlington Ry. Co.*, 107 U. S. 557. In other words, it is not necessary to sustain a compromise of a doubtful right that the parties shall have settled the controversy as the law would have done. It is sufficient to support a compromise that there be an actual controversy between the parties of which the issue fairly may be considered by both parties as doubtful and that at the time of the compromise they, in good faith, so considered it. *Kiefer Oil Co.* v. *McDougal*, 229 Fed. 933; *Long* v. *Towl*, 42 Mo. 545.

To sustain the contention of the petitioner, this court would find it necessary to overturn the well established principles of general law recognized by this court and the Supreme Court of Missouri and applied by the Kansas City Court of Appeals. For the reasons given the writ should be denied.

GEORGE H. KELLY,
WM. BUCHHOLZ,
I. B. KIMBRELL,
MARTIN J. O'DONNELL,
*Counsel for Respondent.*